FILED

Supreme Court of the United States

OCTOBER TERM, 1936

No. 40

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

GUS L. CONSTANTINE, ALIAS DR. GUS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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THE UNITED STATES OF AMERICA, PETITIONER

v.

GUS L. CONSTANTINE, ALIAS DR. GUS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR APPELLEE

STATEMENT.

The question here presented is the validity of Section 701 of the Revenue Act of 1926, c. 27, 44 Stat. 95, (USCA, Title 26, Section 206) on December 3rd, 1934. On this date the Court overruled, (R. 5) Appellee's demurrers, (R. 2), and motion to strike (R. 6) the information filed against him on November 21, 1934, (R. 1), for the violation of said statute.

The cause was submitted on an agreed statement of facts, (R. 7). The Court overruled Defendant's motion to find him not guilty, (R. 15); granted, over defendant's objection, Petitioner's motion to find him guilty, (R. 15); convicted Appellee and passed sentence upon him, (R. 16).

PRIOR DECISIONS ON QUESTION HERE PRESENTED.

On December 17, 1934 the District Court for the Southern District of Alabama, Ervin, District Judge, held the levy in question to be a "penalty" and not an "excise tax."—*Cleveland vs. Davis,* 9 F. Sup. 337.

On January 8th, 1935 the District Court for the Southern District of Georgia, in a well-reasoned opinion by Barrett, District Judge, held that the statute here under consideration levied a "penalty" and not an "excise tax" and fell with the adoption of the 21st Amendment to the Constitution.—*Green vs. Page,* 9 F. Sup. 844.

On February 25th, 1935 the District Court for the Eastern District of South Carolina, Meyers, District Judge, held the levy in question to be a "penalty" and not a "tax", but was of the opinion that the section in question did not fall with the repeal of the 18th Amendment.—*Brabham vs. Cooper,* 9 F. Sup. 904.

On March 13th, 1935, the District Court for the Northern District of Florida, Long, District Judge, held the levy in question to be a "penalty" and not an "excise tax."—*Liberis vs. Nee,* 10 F. Sup. 336.

On March 15th, 1935 the instant case was decided in the United States Circuit Court of Appeals for the Fifth Circuit, in which the court held that the levy in question was a "penalty" and not an "excise tax". This holding standing alone, it is respectfully submitted, entitled the defendant to an acquittal on the information,

pleadings filed, and the agreed statement of facts in this case. However, the Circuit Court of Appeals in said opinion held further that the statute fell with the repeal of the 18th Amendment.—*Constantine vs. United States*, 75 Fed. (2nd) 928.

On April 8th, 1935 the Circuit Court of Appeals for the Tenth Circuit, on an appeal from the District Court for the Northern District of Oklahoma, Kennamer, District Judge, (*U. S. vs. Kesterson*, 8 Fed. Sup. 820) reversed the District Court, and held that the levy in question was a "penalty" and not an "excise tax," and further held that the statute fell with the ratification of the 21st Amendment.—*Kesterson vs. United States*, 76 Fed. (2nd) 913.

SUMMARY OF ARGUMENT

Section 205, Title 26 (USCA), the Internal Revenue Code, prescribes the excise tax to be paid by wholesale and retail dealers in distilled spirits, wines, and malt liquors for the year here in question. It is conceded that this tax was paid by the Appellee. Section 206 levies a penalty in aid of the enforcement of state and municipal prohibition statutes and/or ordinances. Being a penalty it fell on the 5th day of December, 1933, with the ratification of the 21st Amendment. In any event the Appellee's demurrers, and/or motion to strike and/or motion for acquittal on the agreed statement of facts, should have been granted. The decree of the Circuit Court of Appeals, setting aside the conviction and dismissing the cause should be affirmed.

ARGUMENT.

We do not feel that were we to concede the soundness of each of the three propositions argued by Petitioner in its brief, that such a concession would warrant a reversal of this case. In our humble opinion, this case does not hinge alone on either or all of Appellant's three asserted propositions; as is apparent from a careful reading of the opinion of the court below, as well as other decisions on the identical point, heretofore cited in this brief.

However, we are unable to concede the soundness of any of Appellant's three asserted propositions. We shall discuss each, in the order in which they appear in adversary's brief.

REPLY TO PETITIONER'S POINT I.

The Petitioner states in his brief (11) that the Court below held that the statute here under consideration imposed a "penalty as part of the enforcing machinery of the 18th Amendment". Appellee does contend that the exaction levied was a penalty, and not a tax and that it fell with the repeal of the 18th Amendment. This irrespective of whether it formed any part of the enforcing machinery of the amendment or not.

Adversary counsel in his argument doubtless sets up a correct chronology of the origin of the statute insofar as the facts are affirmatively set out therein. However, Counsel overlooked and totally failed to mention certain facts deemed by us to be highly pertinent, some of which were given con-

sideration by the court below, as is apparent from its opinion. While it is true that the instant statute first became a law as part of the revenue Act of 1918, which was approved on February 24, 1919; it is likewise true that the resolution proposing the 18th Amendment was passed by the 65th Congress. It was proposed to the legislatures of the several states on December 19th, 1917. This amendment was declared in a proclamation by the Acting Secretary of State, on the 29th day of January, 1919 to have been ratified by the Legislatures of ¾ of the whole number of states in the Union, and was accordingly effective. The Court below noted that the War Time Prohibition Act, 40 Stat. 1046, was adopted as a law on the 21st day of November, 1918, c 212, 40 Stat. 1046. It was superseded by the National Prohibition Act on the 28th day of October, 1919, c. 85, Sec. 1, 41 Stat. 305; Title 27, USCA. 1. Many of the states, and communities of the nation had passed prohibition laws or ordinances prior to any of the dates herein mentioned. Alabama passed such a state prohibition law during the year 1915, and it has remained effective to the present day, *Chapter 167, Code of Ala. 1923.*

Petitioner in its brief quotes freely from various issues of the Congressional Record as to dates, and the purpose of the enactment of the statute. We note that he fails, however, to quote from any of the volumes evidencing what might be termed, "The Prohibition Mania" which seized our Congress and many of our people at or about the time in question. We will not weight this brief down, by setting forth the

many virtues, and highly beneficial results which Prohibition, it was believed, would inevitably effectuate, as stated in the Congressional Record at this time, by sound members of the National Congress. It is believed that this court still is able to picture the state of the public mind on the prohibition question at that time, and to be impressed with the fact that the instant statute, as evidenced by its recent repeal, is but one of the many statutes passed under the influence of the Prohibition movement which undoubtedly reached its zenith during the year in which the statute here under consideration was enacted into law.

The Court below in reaching its conclusion, excepted to by adversary counsel, gave consideration to the administrative interpretation placed upon the section by the Treasury Department.

It is axiomatic that a Treasury Department regulation interpreting a Revenue statute is accepted, by the Courts unless there is a cogent and persuasive reason for rejecting it.—*McCaugh, Collector vs. Hershey Chocolate Co.*, 283 U. S. 488, 492; 51 S. Ct. 510, 512.

At page 10 of the transcript of the record appears Treasury Department Regulation 3911 approved and published by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury as of July 30, 1926, in which he specifically points out that the statute here under consideration levies a penalty and not a tax. The Commissioner of Internal Revenue in this regulation correctly points out that the levy provided by Sec-

tion 205 of Title 26, levies a tax which is to be treated and collected as such. While the levy under Section 206 of the said Title, while denominated a "special tax" is in truth and in fact a penalty and is to be collected only as penalties are collectible. It will be noted that this regulation was published thirty days after the statute became effective, the same having been adopted on February 26th, 1926, to become effective by its terms "on and after July 1, 1926." It will further be noted, that while the original statute was passed in 1919, that no stamp was ever printed, or shown in any government catalogue of stamps until September 13th, 1934. (R. 8). The Collector of Internal Revenue for Alabama had no such stamp on, or prior to the date of Appellee's arrest in this case. (R. 8) The said Collector in his written demand upon appellee, and other beer dealers, for the payment of internal revenue taxes for the year here in question made no demand for the payment of the $1,000.00, exacted by said Section. (R. 9).

The Court below was properly impressed by the fact that after the adoption of the Act of March 22, 1933, 40 Stat. 18, authorizing the manufacture and sale of beer, that the Congress failed to reenact the Statute though it had been carried forward in many prior revenue acts. It will be further noted that the section has never been reenacted since the repeal of the 18th Amendment. On the contrary, what could not be said by the Court below in its opinion, but which can be said now, Congress did specifically repeal the statute here under considera-

tion in the Revenue Act of 1935, effective on the 1st day of July, 1935. This failure to reenact the statute, and its repeal at or about the date this case reached this Court, make it clear that Congress deemed the purpose and function of the Act, as being to penalize and prohibit. Since the exaction levied was a penalty and not a tax, the statute fell with the repeal of the 18th Amendment.—*Bailey vs. Drexel Furniture Co.*, 259 U. S. 20; 42 S. Ct. 449; 66 L. Ed. 618; *Hill vs. Wallace*, 259 U. S. 44; 42 S. Ct. 453; 66 L. Ed. 822.

Section 205 clearly lays an "excise tax" within the true intendment and meaning of these words as many times defined by this Court, for the sale, at wholesale and retail, of spirits, wines and malt liquors. It will be noted that the tax is graduated, according to whether such person is a wholesale dealer or a retail dealer, and it is again graduated according to the type of liquor sold. That is to say, a tax in one amount is levied for the sale of malt liquor. Another amount, for the sale of distilled spirits. One amount being for a wholesale dealer, another amount for a retail dealer.

Section 202 levies an excise tax in different amounts with reference to the amount of beer manufactured by a brewer.

Section 203 lays a true excise tax on the manufacture of stills: "Manufacturers of stills shall each pay $50.00, and $20.00 for each still or worm for distilling made by him."

Compare the exaction levied by Section 206 in the flat sum of $1,000.00 irrespective of the volume

or type of business carried on. Irrespective of whether the person be a brewer, a distiller, a manufacturer of stills, a wholesale or retail dealer in distilled spirits or malt liquors. Compare this exaction to the true excise tax laid by Sections 202, 203, 204, and 205 of the said Title of the Act, for carrying on exactly the same business. The comparison cannot be made except the conclusion be reached that Section 206 levies no "excise tax" within the true intendment and meaning of that term, but on the contrary levies a penalty for the violation of the laws of, "any State, Territory or District of the United States, contrary to the laws of such State, Territory, or District, or in any place therein in which carrying on such business is prohibited by local or municipal law." *Sect. 206*

The application of the section hinges on the violation of a law. The commission of a crime. This fact strongly indicates that its purpose was penal rather than that of raising revenue for the support of the government.

In the case of *Lipke vs. Lederer*, this Court, speaking through Mr. Justice McReynolds clearly and definitely laid down a sound rule for determining the difference between a tax and a penalty when it used the following language:

> The mere use of the word "tax" in an act primarily designed to define and suppress crime is not enough to show that within the true intendment of the term a tax was laid, Bailey vs. Drexel Furniture Co., 250 U. S. 20; 42 S. Ct. 449; 66 L. Ed. 817. (May 15, 1922). When by its very nature the imposition is a penalty, it must be so regarded Helwig vs. United States,

188 U. S. 605, 613; 23 S. Ct. 427; 47 L. Ed. 614. Evidence of crime (section 29) is essential to assessment under section 35. It lacks all the ordinary characteristics of a tax, whose primary function 'is to provide for the support of the government' and clearly involves the idea of punishment for infraction of the law—the definite function of a penalty.

O'Sullivan vs. Felix, 233 U. S. 318, 324; 34 S. Ct. 596; 58 L. Ed. 980. *Lipke vs. Lederer*, 259 U. S. 557, 561, 562; 42 S. Ct. 549; 66 L. Ed. 1061.

The exaction made by Section 206 for the sale of malt liquor is $1,000.00 per year. Compare this to the true excise tax in the amount of $20.00 levied for the sale of the same liquor under Section 205. It will be noted that the levy where the sale of malt liquor is illegally made, is fifty times the true excise tax levied when the sale is lawfully made. This great difference is strong evidence that the imposition based upon illegality was intended as a penalty and not as a tax. The Court should take judicial knowledge of the fact that the average small retail beer dealer could not pay in addition to all other licenses, taxes and costs of operating his business the sum exacted by said section, and stay in business. The statute is therefore not only penal in its nature, but prohibitory in effect. This Court in the case of *Helvering vs. United States*, 188 U. S. 605, cited in *Lipke vs. Lederer, supra*, said at page 613:

> Although the sum imposed by reason of undervaluation may be simply described as "a further sum" or "an additional duty", if it is yet so enormously in excess of the greatest amount of

> regular duty ever imposed upon an article of the same nature, and it is imposed by reason of the action of the importer, such facts clearly show it is a penalty in its intrinsic nature, and the failure of the statute to designate it as a penalty, but describing it as "a further sum" or "an additional duty", will not work a statutory alteration of the nature of the imposition, and it will be regarded as a penalty when by its very nature it is a penalty. It is impossible, judging simply from its language, to hold this provision to be other than penal in its nature.

It will be noted that on February 24th, 1931, while Section 35 of the National Prohibition Act, doubling certain taxes, was in effect, this Court held the exaction levied by the section here under consideration to be a penalty and not a tax. Adversary counsel seems to take consolation in the fact that the levy was there doubled. We fail to see, however, how this latter fact in any way affects the fundamental status of the $1,000.00 exaction, levied by the statute. It is our opinion that the language used by this Court in the case referred to is decisive of the issue here presented when it held:

> By section 701, par. 9 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 327 (U. S. C. title 26, Sec. 206 (26 USCA Sec. 206 note) it is provided that every person carrying on the business of retail liquor dealer, etc. in any state, etc., contrary to the laws of such state, etc. or in any place where the carrying on of such business is prohibited by local or municipal law, shall pay in addition to all other taxes, $1,000. This section was passed in lieu of a similar provision in the Revenue Act of 1918 (sec-

tion 1001, 40 Stat. 1128) repeated in the Revenue Act of 1921, (Sec. 1001, 42 Stat. 296). The government, accordingly, treats the item sought to be recovered under section 701 as having been imposed by an act in force prior to the National Prohibition Act. With that view we agree.

Of the four items involved, two unmistakably are penalties, and are so denominated. The other two, notwithstanding they are called taxes, are in their nature also penalties.

A "tax" is an enforced contribution to provide for the support of government; a "penalty" as the word is here used, is an exaction imposed by statute as punishment for an unlawful act. The two words are not interchangeable one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such. That the exaction here in question is not a true tax, but a penalty involving the idea of punishment for infraction of the law is settled by *Lipke vs. Lederer*, 259 U. S. 557, 561-562; 42 S. Ct. 549; 66 L. Ed. 1061. See also *Regal Drug Corp. v. Wardell*, 260 U. S. 386; 43 S. Ct. 152; 67 L. Ed. 318.

U. S. vs. LaFranca, ~~*supra*,~~ 282 U. S. 568; 51 S. Ct. 278, 280.

With the repeal of the Eighteenth Amendment the Federal Government lost its right to penalize the sale of malt liquors within the several states. This is essentially true for that no power was left in Congress after the repeal of the Eighteenth Amendment to legislate on the subject except for the purpose of taxation. This Court and many other courts have recently held, "that the effect of the repeal of the Eighteenth Amendment,

without a saving clause, was to repeal the statute creating the offense charged in the indictment."

The repeal of the Eighteenth Amendment by the Twenty-first Amendment deprived Congress of the power to enact or continue in force legislation on the subject of liquor prohibition insofar as such power was derived solely from the Eighteenth Amendment (National Prohibition Act, (27 USCA); Const. Amend. 18 and 21). *Green vs. U. S.* (9 CCA) 67 Fed. (2nd) 846; *U. S. vs. Chambers,* 291 U. S. 217; 78 L. Ed. 653; *Massey vs. U. S.,* 191 U. S. 532; 78 L. Ed. 1019; 89 A. L. R. 1510.

REPLY TO PETITIONER'S POINT II.

Appellant in the Second Proposition urges that this cause be reversed, for that, the section in question, "imposes an excise tax and does not infringe upon the reserved powers of the States". We are unable to concur in this conclusion. We deny that the court below rested its decision on this basis. However, we do believe that the levy if it be held to be a tax, does infringe upon the reserved powers of the States.

The purpose of this statute, as is clearly apparent upon its face, is to enable the Federal Government to regulate or prohibit intrastate dealing in liquor, which is purely a function of the State authority since the repeal of the Eighteenth Amendment. The statute violates the provisions of the tenth amendment of the Constitution of the United States, for that Congress under the guise of a tax, seeks to regulate or prohibit intrastate dealings in malt liquor. *10 Amendment Constitution of United States; Bailey vs. Drexel Furniture Company, Supra;*

Hammer vs. Dagenhart, 247 U. S. 251; 38 Sup. Ct. Rep. 529; *Kansas vs. Colorado,* 206 U. S. 46, 27 S. Ct. 655.

Since the repeal of the Eighteenth Amendment the regulation of the business of dealing in malt liquor is a matter wholly within the police power of the several states. Who can read the instant statute and reach any conclusion other than that it levies a heavy exaction on this business for the purpose of regulating or prohibiting the same? We need only turn to the provisions of the preceding code section, namely, Section 205, Title 26, USCA to find there a uniform tax laid for the purpose of producing revenue, which the Appellant here, under the undisputed evidence, paid. This is the tax laid by the sovereign against all of its citizens throughout the several states for the privilege of doing or engaging in this particular business. The fact that the amount of the levy here under consideration is disproportionate and is in addition to the levy laid by Section 205, makes its purpose at once apparent.

Grant the validity of this law, all that Congress would need to do thereafter in seeking to take over control of any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the Tenth Amendment to our Constitution, would be to enact a detailed measure of complete regulation of the subject and enforce it by so-called taxes laid upon departures from it. It was not the intention of the framers of our Constitution or its citizens since its adoption, to give such magic to the word "tax", as would break down all constitutional limitations under the powers of Congress

and completely wipe out the sovereignty of the several states.

The language used by this court, Mr. Justice Taft, speaking in the case of *Bailey vs. Drexel Furniture Company* (Child Labor Tax case), *supra*, supports the contention of the invalidity of the statute. For this reason we take the liberty of quoting the following excerpts from the opinion in the Bailey case, which impress us as being of particular application here:

> Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty? If a tax, it is clearly an excise. If it were an excise on a commodity or other thing of value, we might not be permitted under previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax. But this act is more.
>
> In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?
>
> It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not instructed to Congress, but left or committed by the supreme law of the land to the control of the states. We cannot avoid the duty, even though it requires us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insiduous feature because it leads citi-

zens and legislators of good purpose to promote it, without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards. In the maintenance of local self-government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half.

Out of a proper respect for the acts of a co-ordinate branch of the government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting, from the weight of the tax, it was intended to destroy its subject. But in the act before us the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions.

REPLY TO PETITIONER'S POINT III.

Appellants in their Third Proposition Brief (45) urge the reversal of this cause for that, "The tax meets the uniformity requirements of the Constitution." While the Circuit Court did not reverse the District Court on this ground standing alone, it is true that it did state in its opinion in effect that; "The additional consideration, that it is gravely doubtful whether, if the act be construed as imposing an excise tax, it would be valid, since applicable to some states and portions of states and not to others, it is wanting in that geographical uniformity essential to the valid exercise by Congress of such taxing power, further impels to the view that the imposition of the act is not a tax but a penalty." (citing authorities). *Constantine, Supra, page 930.*

The point is here taken that if the said section be held to levy a true tax, it is an unwarranted delegation

by the Congress of the United States of its power to lay taxes, to the several states, municipalities and local communities of the United States, and accordingly does violence to Article I Section 8 of our Federal Constitution.

The people of our nation granted only to the Congress of the United States, through Article I Section 8 of our Federal Constitution, the power to lay and collect taxes, to pay debts, and provide for the common defense and general welfare of our country. If the exaction here under consideration be held to be a tax, it could be laid or repealed not only at the instance of any of the several states, or the several municipalities, but at the whim of any local community in the United States. The support of the vital functions of government cannot be made to depend upon the whim of the trustees of a local county township. Such was not the intention of the framers of our constitution or of our people in adopting it as the basic law of the land.

Our Supreme Court has many times held that the subject, taxation, was entrusted to Congress, to be dealt with according to its discretion, not for delegation to others. Such an authorization would inevitably destroy the harmony and uniformity which the constitution not only contemplated, but actually established. It would defeat the very purpose of the grant. Congress cannot transfer its legislative power to the states. By nature this is non-delegable. The foregoing is practically the language of Mr. Justice McReynolds speaking for this Court in the case of: *Knickerbocker Ice Co. vs. Stewart,* 253 U. S. 149; 40 S. Ct. 438.

Mr. Justice Fuller speaking for this Court in the case of *John M. Wilkerson vs. Charles Rahrer*, 287 U. S. 77; 53 S. Ct. 42, 49, squarely supports this point using the following language:

> Nor can Congress transfer legislative powers to a state, nor sanction a state law in violation of the constitution; and if it can adopt a state law as its own, it must be one that it would be competent for it to enact itself, and not a law passed in the exercise of the police power. *Cooley v. Board of Wardens*, 52 U. S. 12 How. 299 (13; 996); *Gunn vs. Barry*, 82 U. S. 15 Wall 610, 623 (21; 212, 215); *United States v. Dewitt*, 76 U. S. 9 Wall 41 (19; 593).
>
> It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a state.

In the very recent case of *Panama Refining Company vs. Ryan*, ... U. S. .....; 79 L. Ed. 223 (Advance Sheets) 55 S. Ct. 241, 248, this Court held, speaking through Mr. Justice Hughes:

> The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.

While it is true that unequal application of a tax due to conditions peculiar to various states is not of itself a lack of constitutional uniformity, and that the state statutes cannot be used to spell out a lack of uniformity, it is likewise true that the peculiar condition of specific states may not be chosen as the very basis for the imposition of the tax.

Here it is plain that the alleged tax was levied without any thought of uniformity. The sole purpose of the tax being to lay it only in states or local communities where the sale of malt liquors is prohibited by local regulations. In short, the sole purpose of the levy is to aid in the enforcement of a local police regulation. The Congressional intent and purpose in the enactment of the statute here under consideration, from the language used therein, is plain and is clearly violative of Section 8, Article 1 of our Federal Constitution.

SUMMARY

The gravamen of this suit is laid in the information, (R. 1). The charge is that Appellee, "did then and there unlawfully carry on the business of a retail dealer in malt liquor, without first having paid the special excise tax of $1,000.00; that at the time and place aforesaid, the laws of the State of Alabama prohibited the carrying on of the business of a retail dealer in malt liquor, and the carrying on of such business was contrary to the laws of the State of Alabama." It is at once apparent that the violation of a state statute is the basis for the imposition of the exaction here under consideration.

Treasury Department Regulations number 3911, approved and published as of July 30, 1926, (R. 10) declared the exaction to be a penalty and not a tax. This Regulation clearly and correctly points out the difference between an excise tax and a penalty. If differentiates between the exaction levied by Section

205, which it correctly denominates as an excise tax, and the exaction levied by Section 206, which it correctly denominates as a penalty. The Appellee had in his possession as of the date of the information and as of the date of the trial in the District Court, the circular published by the Collector of Internal Revenue for the District of Alabama, (R. 9) which had been delivered to him by said Collector, and addressed, "to all beer and liquor dealers", advising him as to the tax that he would be required to pay for the year here in question, namely, July 1, 1934 to June 30, 1935. No mention is made in this circular of the $1,000.00, the failure to pay which led to the filing of the information, the basis of this suit, on November 21, 1934; charging the failure to pay the said exaction on October 8, 1934 (R. 1).

Appellee registered with the Collector of Internal Revenue and paid all taxes as mentioned in the circular, to the United States as therein required, (R. 11).

Harwell G. Davis, Collector of Internal Revenue for the District of Alabama, did not have in his possession or under his control the $1,000.00 liquor stamp until November 27, 1934. No such stamps were shown to be in existence in any catalogue of stamps issued by the United States prior to the 13th day of September, 1934. These facts were stipulated, (R. 8). Accordingly the said alleged excise tax could not have been paid by this defendant as of the date alleged in said information without violating the provisions of Section 12, Title 26, USCA. It is

axiomatic that no citizen must violate one statute in order to prevent his violating another statute. This essentially is true where the statutes in question form part and parcel of the Regulations pertinent to a single subject, under a single title of our Federal Code. The government's fiscal year here in question began July 1, 1934. It is accordingly apparent that if the exaction was a true excise tax, it should have been paid as of that date, and the required stamp issued therefor. The amount of the exaction levied compared to the true tax levied for engaging in the same business is sufficient, standing alone, to make the Congressional intendment of penalizing and prohibiting, rather than the raising of revenue, for the support of the government, at once apparent.

CONCLUSION.

We feel that the most convincing conclusion possible is simply again to invite the Court's attention to the exceptionally well-reasoned opinion rendered in this cause by the Court below. We feel that the facts stated by the Court below in reaching its decision when considered by this court will impel the same conclusion, namely, that the exaction levied by the statute is a penalty, rather than a true tax. Being penal in its nature, it fell with the repeal of the 18th Amendment to the Constitution. That should the exaction be construed to be a tax rather than a penalty, it would be wanting in that geographic uniformity essential to the valid exercise by Congress of its taxing powers. A statute must always be construed, if reasonably possible, so as to avoid not

only the conclusion that it is unconstitutional, but also grave doubts upon that score. That for these, and other reasons heretofore shown in this brief and as set forth in the opinion of the Court below, the decree appealed from should be affirmed.

Respectfully submitted,

WILLIAM S. PRITCHARD,
Attorney for Appellee.

CERTIFICATE OF COUNSEL AS TO SERVICE.

I, the undersigned, of counsel for Appellee in this cause, hereby certify that I have on this the 16th day of October, 1935, served three copies of the foregoing Brief and Argument on Hon. Stanley Reed, Solicitor General, have mailed single copies to Mr. Joseph B. Keenan, Assistant Attorney General, Messrs. James E. Ruffin and Mahlon D. Kiefer, whose names appear as Special Assistants to the Attorney General on the brief in this cause, at Washington, D. C., and to Mr. Jim C. Smith, United States Attorney, at Birmingham, Alabama.

WILLIAM S. PRITCHARD,
Attorney for Appellee.